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## STANDARD CHARTERED BANK

v.

ASIA TRANSPORT SERVICE (M) SDN. BHD. &amp; 3 ORS.

HIGH COURT MALAYA, KUALA LUMPUR

TUAN RICHARD TALALLA J

*b*

[COMMERCIAL DIVISION D2-22-1362-93]

24 JULY 1995

*c*

**PRACTICE & PROCEDURE:** O. 15 r. 7 RHC - Joint application of English bank and Malaysian bank to substitute Malaysian bank as plaintiff in pending action - Business rights of English bank sold and transferred to Malaysian bank - Transfer agreement given effect by order of Court - Section 50(1) of the Banking and Financial Institutions Act 1989 - Whether Malaysian bank and English bank had locus standi to bring the application - Whether leave of Court to intervene required prior to application for substitution - Whether substitution necessary in view of Court order.

*d*

This was an appeal against the decision of the learned Deputy Registrar dismissing the joint application of the plaintiff (the English bank) and the Standard Chartered Bank Malaysia (the Malaysian bank) for an order substituting the Malaysian bank as plaintiff in this action pursuant to O. 15 r. 7(2) of the Rules of the High Court 1980 (the Rules).

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Pursuant to the Banking and Financial Institutions Act 1989 (the Act) the English bank sold and transferred its business to the Malaysian bank which agreement was duly approved by the Minister. The sale agreement was given effect by a Court order (the Order) under s. 50(1) of the Act and the transfer date was ordered to be 1 July 1994. The Order *inter alia* provided that as from the transfer date the Malaysian bank would have the same rights and powers as to commencing and defending legal proceedings as if at all times it had been a right of the Malaysian bank including pending actions immediately before the transfer date by or against the English bank. The respondent argued that the Malaysian and English banks had no *locus standi* to bring the application as the former was not a party to the action and the latter had divested itself from all its rights. He further argued that the Malaysian bank should first have applied for leave of Court to intervene under O. 15 r. 6(2)(b)(ii) of the Rules before applying to be substituted. Question was also raised as to whether there was any necessity for either bank to make the application for substitution in view of the clear terms of the Order.

*f***Held:***g*

[1] There is nothing in O. 15 r. 7 of the Rules to support the proposition that a stranger to proceedings seeking to get in should first obtain leave to intervene therein. Subrule (2) does not stipulate who is entitled to make the application. However by subrule (3), it is envisaged that any person is entitled to make it, including a stranger to the proceedings whom the subrules by necessary implication embrace any way.

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[2] The Malaysian bank to whom the right of action of the English bank had been assigned was seeking not merely to be added as a party, or to intervene so to speak, but to be a plaintiff in the action. Accordingly, the Malaysian bank had to do no more than make an application under O. 15 r. 7(2) for an order that the proceedings be carried on as if the Malaysian bank had been substituted for the English bank.

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[3] The Court order itself does not provide a procedure for substitution and therefore any person seeking relief from the Court can only do so in accordance with the Rules.

**[4]** The English bank had an interest and right at all times to protect itself from liability arising from the consequences of the transfer as the English bank had relinquished control over the proceedings and was in jeopardy of being mulcted in costs by reason of any possible act or default of the Malaysian bank relative to these proceedings. It therefore follows that the English bank did have *locus standi* to bring the application.

*[Application as brought by Malaysian bank dismissed with costs. Insofar as application brought by English bank, Registrar's order set aside to the extent the order constitutes a dismissal of the English bank's application for leave to amend the writ that Standard Chartered Bank Malaysia Berhad be substituted for the plaintiff. No order as to costs of the appeal].*

**Cases referred to:**

*Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1989] 2 MLJ 298 (**cit**)  
*United Asian Bank Bhd. v. Personal Representatives of Roshammah (decd) & Ors.* [1994] 3 MLJ 327 (**cit**)  
*Toprak Enerji Sany AS v. Sale Tilney Technology P/C* [1994] 3 All ER 483 (**refd**)  
*Mercer Alloys Corporation and Anor. v. Rolls Royce Ltd.* [1972] 1 All ER 211 (**refd**)

**Legislation referred to:**

Banking Act 1973  
 Banking and Financial Institutions Act 1989, ss. 1, 2(1), 4, 6(4), 49, 50(1), (3), 128(1), 129(1)(a),(3)  
 Companies Act 1965 s. 49  
 Court of Judicature Act 1964, ss. 16, 17  
 Rules of the High Court 1980, O. 15 rr. 6(2)(b), (ii), 7(2)

*For the plaintiff - W.M. Chang; M/s. Raja, Darryl & Loh*  
*For the third defendant - Joy Appukuttan; M/s. Wang Kuo Shing & Co.*

**JUDGMENT**

**Richard Talalla J:**

This is an appeal against the decision of the learned Deputy Registrar (the Registrar) made on 26 October 1994 dismissing the joint application (the application) of the plaintiff (the English bank) and Standard Chartered Bank Malaysia Berhad (the Malaysian bank) for an order that the Malaysian bank be substituted as the plaintiff in this action.

In the previous decade the government instituted a policy that all foreign banks intending to conduct banking business in Malaysia must be locally incorporated within 5 years. The policy metamorphosed into the Banking and Financial Institutions Act 1989 (the Act). Hereafter all references to sections subsections and paragraphs are to those of the Act. Section 4 forbids any person to carry on *inter alia* banking business unless it is a corporation and holds a valid licence granted under subsection 6(4) to carry on such business. Under subsection 128(1) the Banking Act 1973 was repealed. The licence of the English Bank to carry on banking business was granted under the repealed Act. However, paragraph 129(1)(a) provided for it to be deemed to be a licence granted under subsection 6(4) but, being a bank established outside Malaysia (a foreign bank), to remain valid for a period of five years from the effective date, the effective date being defined in s. 2(1) as the relevant date or dates, as the case may be, notified by the Minister under s. 1. Subsection 129(3) provides for the surrender of such a licence before the expiry of the said period and if before such surrender the holder has, subject to s. 49, transferred its property business and liabilities to a public company having the meaning assigned thereto by the Companies Act 1965, such public company shall, upon application to the

- a* Minister and surrender of such licence by the holder, be granted a licence under subsection 6(4), with or without conditions to carry on banking business. Section 49 provides for a proposed agreement or arrangement to transfer such business to be in writing and approved by the Minister upon the parties applying to him in writing for the same. Upon receiving such approval the foreign bank and the said public company may make a joint application to the High Court pursuant to s. 50 for such order as may be required to facilitate or enable the transfer agreement being given effect to.
- b*

- In accordance with the provisions of the Act, the English bank took the following steps to wit the Malaysian bank was incorporated and the English bank as vendor and the Malaysian bank as purchaser entered into a sale and purchase agreement (the sale agreement) which was duly approved by the Minister. Clause 3 of the sale agreement provided for the sale of the business of the English bank to the Malaysian bank. The said business was to include all securities as well as all the rights, powers and remedies of the English bank and in particular the rights and powers as to taking or resisting legal proceedings. By way of a joint application made by the English bank and the Malaysian bank by *ex parte* originating summons pursuant to subsection 50(1) of the Act, the Court made an Order (the Order). The effective date of the sale and transfer of the said business to the Malaysian bank (the transfer date) was as stated in the sale agreement, ordered therein to be 1 July 1994.
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- The Order provided that as from the transfer date, any existing instrument of the English bank would be construed and enforced as if reference to the English bank therein be substituted with a reference to the Malaysian bank. The Order further provided that as from the transfer date, the Malaysian bank would have the same rights and powers as to commencing and defending legal proceedings for ensuring, preserving or enforcing a right as if at all times it had been a right of the Malaysian bank including those rights in respect of any legal proceedings pending immediately before the transfer date by or against the English bank. Subsection 50(3) stipulates that an order under subsection (1) shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under that section or any other related proceedings, or had no notice of the proceedings under that section or of other related proceedings.
- e*
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- The provisions of the Act having been complied with and in consequence the said order having been made the business and rights of the English bank including the right to proceed with this action had to be taken to have been transferred to the Malaysian bank with effect from the transfer date.
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- Order 15 r. 7(2) of the Rules Of the High Court 1980 (the Rules) was relied on to support the application. That rule provides as follows:

- Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
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- The Registrar dismissed the application on grounds *inter alia*, firstly, that the Malaysian bank had no *locus standi* to bring the application, the Malaysian bank not being a party to the action, and secondly, that the English bank having divested itself of all its rights
- i*

including its rights in this action, the English bank had no *locus standi* to bring the application and indeed in respect of the whole action. The English bank being aggrieved by the decision of the Registrar brought this appeal.

The argument of the third defendant who is the only respondent to this appeal was the same as that argued before the Registrar, namely, that the English bank ceased to have further rights in this action from the transfer date and therefore was not in a position to pursue the application, that the Malaysian bank was not a party to this action, hence it was not in a position to make the application, and that the Malaysian bank should first have applied for leave of this Court pursuant to O. 15 r. 6(2)(b)(ii) of the Rules to intervene in this action before applying to be substituted as the plaintiff in this action.

Counsel for the respondent emphasised that he was not disputing the Order or the right of the Malaysian bank to be substituted as the plaintiff but only the procedure to be followed to the end that the Malaysian bank be substituted as the plaintiff. In arguing for intervention proceedings pursuant to the rule last referred to, Counsel for the respondent relied on the cases of *Tohtonku Sdn.Bhd. v. Superace (M) Sdn. Bhd.* [1989] 2 MLJ 298 and *United Asian Bank Bhd. v. Personal Representatives of Roshammah (decd) & Ors.* [1994] 3 MLJ 327.

Counsel for the appellant had earlier relied on 2 authorities, namely, *Toprak Enerji Sany AS v. Sale Tilney Technology P/C* [1994] 3 All ER 483 and *Mercer Alloys Corporation and Anor. v. Rolls Royce Ltd.* [1972] 1 All ER 211. In the former case the facts were that the defendant company entered into a contract with the plaintiff company, E, which was incorporated in Turkey, to supply machinery and equipment for installation in a plant manufacturing fluorescent light fittings, which E had agreed to establish in Turkey. Legal proceedings were commenced by E against the defendant for breach of the aforesaid contract in August 1990. Later that year E merged with and was absorbed by a sister company, SR, which subsequently merged with another company, SN, belonging to the same group, such that the effect of the mergers under Turkish law was that, by reason of the doctrine of universal succession, E ceased to exist and all its assets and liabilities, including the right to bring proceedings against the defendant, were transferred, first to SR and then to SN. Following the mergers, SN applied for leave under RSC O. 15, r. 7 to be substituted for E as plaintiff in the action. The Court held that on the facts, it was evident that the substitution of SN was clearly necessary for the determination of the action, that the defendant would suffer no prejudice by reason of the substitution and that the Court would accordingly order that SN be substituted as plaintiff in the action pursuant to O. 15 r. 7(2). Counsel for the respondent sought to distinguish *Toprak's* case arguing that in that case the issue that a party must first obtain leave to intervene was not raised, that in the instant case the English bank and the Malaysian bank are existing entities, whereas the merger of E with SN had led to the cessation of existence of E altogether, and that in that case the application was made by SN whereas the appeal here is only pursued by the English bank who, as Counsel reiterated, had no further interest in this matter. In the *Mercer* Case, two Californian companies Mercer and Stalco issued a writ in April 1970 against the defendant. In July 1970, unknown to the defendant, Stalco merged with another Californian company, Whittaker. From that date, according to Californian law Stalco, while ceasing to exist as a separate corporate entity, continued to exist for the purpose of pending suits. Consent judgment was recorded in February 1971 and the defendant subsequently, having learnt of the merger sought to set aside the judgment on the ground that since at the material date Stalco had ceased to exist the judgment was null and void. The plaintiffs applied to amend the title of the action by

- a* substituting Whittaker as the second plaintiff. Counsel for the respondent sought also to distinguish *Mercer's* case arguing that in that case again, the issue that a party must first obtain leave to intervene was not raised. The application was made by the plaintiffs who had *locus standi* to make such an application to substitute the parties, whereas here, Counsel persisted, the English bank had no such right. The Court there held that it had the power both under rules of Court, that is to say RSC O. 15, r. 6(2) and 7(2), and by
- b* virtue of its inherent jurisdiction to make such an order after judgment in certain circumstances and in the circumstances it was right and proper and in the interests of justice for the Court to order the amendment, since at the time of the settlement it had been the intention of the parties to put an end to the litigation between them and the amendment would give effect to that intention.
- c* As to whether Counsel for the defendant is right in saying that the Malaysian bank should have applied for an order for leave to intervene in these proceedings it has to be borne in mind that the Malaysian bank is not privy to this appeal and therefore anything which I say in regard thereto will be *obiter dictum*. However, both Counsel required of me certain guidance in the matter as apparently there is some confusion as to what the proper procedure is generally and in the circumstances. That being the case I shall venture to state my view. My view is that leave to intervene is no more than a manner of speech.
- d* The Rules do not provide for intervention as such. Rather, under O. 15 r. 6(2) (b) a person not being a party but desirous of being one may apply for an order to be added as a party, but the subrule provides that no person shall be added as a plaintiff without his consent. As to the submission of Counsel for the defendant that a stranger to the proceedings seeking to get in should first obtain leave to intervene therein, I could find nothing in the Rules to support such a proposition. It is true that subrule (2) does not
- e* stipulate who is entitled to make the application. However, by reference to subrule (3) it is envisaged that any person is entitled to make it, and that will include a stranger to the proceedings whom the subrules by necessary implication embrace any way. In this instance the Malaysian bank was not a person seeking relief in respect of a right independent of the English bank but rather relief in respect of the same right against the same party namely the defendant. In short, the Malaysian bank was seeking to step
- f* into the shoes of the English bank. The Malaysian bank to whom the right of action of the English bank had been assigned or on whom it has devolved was seeking not merely to be added as a party, or to intervene so to speak, but to be plaintiff in the action. Accordingly the Malaysian bank had to do no more than make an application under O. 15 r. 7(2) (again there is no restriction in the subrule as to who is entitled to make the application) for an order that the proceedings be carried on as if the Malaysian bank
- g* had been substituted for the English bank which it is believed is what it actually did but the application was dismissed and against the dismissal there was no appeal. Another question in respect of which there is some uncertainty is whether in view of the Order there is any necessity for either bank to make application at all for substitution of the English bank, that the Order in its terms abovestated speaks for itself and that therefore
- h* all the Malaysian bank needs to do is to file or produce the Order in these proceedings where after it should be entitled to prosecute the action as the plaintiff. The order itself does not provide for such a procedure. As I see it, any person seeking relief from the Court in its jurisdiction to try civil cases can only do so in accordance with the rules, it being borne in mind that the rules were made by the Rules Committee to regulate and prescribe the procedure and practice to be followed in the Court. See ss. 16 and 17 of the Courts of Judicature Act 1964.
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I find myself unable to subscribe to the view that the English bank as from the transfer date ceased to have any rights in or in respect of this action and *locus standi*. Admittedly, as from the transfer date the English bank ceased to have any rights or interest in the defined business as such. But certainly to my mind, the English bank had an interest and a right at all times to protect itself from liability arising from the consequences of such transfer. It seems to me that such a liability could arise in the realm of costs as long as the English bank remained a plaintiff in this action. Having divested itself of its rights including its rights in these proceedings in favour of the Malaysian bank, the English bank as long as it remains as plaintiff in this action would be in jeopardy as to costs seeing that by reason of the transfer of rights the Malaysian bank is *dominus litis* and the English bank is no more in control of the proceedings. It follows therefore that the English bank has certainly a right and is well advised to take all proper steps immediately to remove itself as plaintiff in the proceedings, thus protecting itself from being mulcted in costs by reason of any possible act or default of the Malaysian bank relative to these proceedings. It follows therefore that the English bank did have *locus standi* to bring the application, seeking the order that it be substituted in these proceedings by the Malaysian bank. I might add that I could see nothing wrong in the English bank and the Malaysian bank making the application jointly.

The application insofar as it was brought by the Malaysian bank is to remain dismissed with costs. Insofar as the application was brought by the English bank, I order that the Registrar's order be set aside to the extent only that the order constitutes a dismissal of the English bank's application for leave to amend the writ, that Standard Chartered Bank Malaysia Berhad be substituted for the plaintiff and that there be no order as to the costs of appeal.

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